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No. 97-698

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAYNA R. PATRICK LAYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a sentence is "imposed" under Federal Rule of Criminal Procedure 35 when it is orally announced at a defendant's sentencing hearing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 116 F.3d 105.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1997. A petition for rehearing was denied on July 22, 1997. Pet. App. 11-12. The petition for a writ of certiorari was filed on October 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following her plea of guilty in the United States District Court for the Western District of Virginia, petitioner was convicted of conspiring to manufacture and distribute marijuana, in violation of 21 U.S.C. 846.

The district court sentenced her to a term of 36 months' probation, including a nine-month period of home detention with electronic monitoring.[1] Pet. App. 3-4. On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. *Id.* at 1-10.

1. In 1988, petitioner and her husband, Victor Layman, approached George and Cheryl Fender with a plan to grow large quantities of high-quality marijuana in the vicinity of Roanoke, Virginia. The conspirators divided responsibilities for the enterprise among themselves: the Fenders would cultivate the marijuana in "grow houses" financed by Joe Bennett Smith, while Victor Layman would process and distribute the marijuana. Eventually the conspiracy expanded to include other persons who operated additional grow houses. The conspiracy continued until 1995, when the participants were indicted. Pet. App. 3.

2. On Friday, May 17, 1996, petitioner appeared for sentencing. The district court determined that her Guidelines range was 6-12 months' imprisonment and sentenced her to a term of nine months' imprisonment, to be followed by a 36-month period of supervised release. Pet. App. 45-46. The court did not file a written judgment and commitment order at that time. *Id.* at 3.

Over the following weekend, petitioner and her husband each wrote a letter to the district court requesting that the court modify its earlier sentence

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[1] Co-defendant Joe Bennett Smith likewise pleaded guilty to conspiring to manufacture and distribute marijuana, and was sentenced to a term of 57 months' imprisonment. Pet. App. 1, 4.

and place petitioner in home detention. Petitioner subsequently filed a motion that formally requested that her sentence be modified. At a May 30, 1996, hearing on the motion, the district court stated that its earlier oral pronouncement of sentence on May 17, 1996, did not constitute an "imposition of sentence" within the meaning of Federal Rule of Criminal Procedure 35(c). That Rule provides that "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." The government objected to any resentencing of petitioner on the ground that sentence had been "imposed" on May 17, and that the conditions of Rule 35(c) had not been satisfied. Pet. App. 57. The district court rejected that contention, reasoning that it had not yet "imposed" sentence because it had not entered a written order. *Id.* at 60. It then sentenced petitioner to a term of nine months' home confinement, to be followed by a 36-month period of supervised release. The court said that it adhered to its previous sentence, but was substituting home confinement for imprisonment. Pet. App. 3-4; Gov't C.A. Br. 3.

The probation office subsequently notified the district court that the May 30, 1996, sentence was illegal.[2] The court scheduled a hearing for June 4, 1996. At that hearing, the court placed petitioner on probation for a period of 36 months, with nine months of home detention as a condition of probation. The

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[2] Under Guidelines § 5C1.1(c)(2), the district court could have sentenced petitioner to a term of supervised release that included home detention, but only if at least one month of the sentence involved imprisonment. See Pet. App. 4 n.1.

court filed its judgment and commitment order on June 5, 1996. Pet. App. 4; Gov't C.A. Br. 3-4.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 1-10. The court of appeals initially observed that "[t]he authority of the district court to modify a sentence pursuant to [Fed. R. Crim. P.] 35(c) is severely limited," and that Rule 35(c) does not permit a sentencing court merely to change its mind about a sentence. Pet. App. 5. The court of appeals then held that "a sentence is imposed for purposes of Rule 35(c) when it is orally pronounced by the district court." *Id.* at 6.[3] The court explained that its conclusion was based on the Sixth Amendment, which gives a defendant the right to be physically present at sentencing. *Ibid.* Moreover, the court reasoned that "a rule that sentence is 'imposed' when it is orally pronounced better promotes the goal of finality in sentencing." *Ibid.* Accordingly, the court of appeals concluded that the district court had imposed sentence on petitioner within the meaning of Rule 35(c) at the May 17, 1996 hearing. *Id.* at 7.

The court of appeals also found that the later modification of petitioner's sentence was based not on the correction of an "arithmetical, technical, or other clear error" under Rule 35(c), but "rather was the product of a change of heart by the sentencing judge." Pet. App. 7. The court of appeals therefore vacated

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[3] The court of appeals noted (Pet. App. 6) that the Second and Tenth Circuits had reached the same conclusion (*United States* v. *Abreau-Cabrera*, 64 F.3d 67, 73-74 (2d Cir. 1995); *United States* v. *Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994)), but that the Seventh Circuit had reached a contrary conclusion (*United States* v. *Clay*, 37 F.3d 338, 340 (7th Cir. 1994)).

petitioner's sentence and remanded with instructions that the district court impose the sentence pronounced at the May 17, 1996 hearing. *Ibid.*[4]

ARGUMENT

Petitioner argues (Pet. 5-29) that the court of appeals erred in holding that the district court lacked authority to modify petitioner's sentence after the initial oral pronouncement of sentence, and that this Court should grant review because the courts of appeals are divided on that issue. Those contentions lack merit.

1. Before November 1, 1987, the effective date of the Sentencing Guidelines, a district court had authority to reduce a sentence pursuant to a motion filed within 120 days of the imposition of sentence. The Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, however, restricted the authority of a district court to modify a sentence "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." 18 U.S.C. 3582(c)(1)(B). With the advent of the Guidelines, Congress amended Rule 35 to eliminate the 120-day period in which a district court had power to modify a sentence. The effect of that amendment was generally to ensure that "the sentence imposed in the public forum or during the sentencing hearing would remain constant, immune from later modification." *United States* v. *Cook*, 890 F.2d 672, 675 (4th Cir. 1989). The district court, however, retained jurisdic-

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[4] The court of appeals also rejected co-defendant Smith's contention that because the government had not seized any live marijuana plants, the district court had erred in applying the 100 gram-per-plant ratio found in the Sentencing Guidelines. See Pet. App. 7-9.

tion to correct an "acknowledged and obvious mistake" within the time period for the filing of a notice of appeal by any party. *Ibid.* That narrow authority did "not extend to a situation where the district court simply changes his mind about the sentence." *Ibid.*

In 1991, Rule 35 was again amended to add subdivision (c), which codified in part the result reached in *Cook* and *United States* v. *Rico*, 902 F.2d 1065 (2d Cir.), cert. denied, 498 U.S. 943 (1990), but imposed a more stringent time requirement. The amended rule allows a district court "within 7 days after the imposition of sentence[] [to] correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c). The Advisory Committee Notes to the 1991 Amendment make it clear that the authority to correct a sentence is narrow and that the Rule is not intended to allow a sentencing court simply to change its mind:

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). *The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence.* Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.

Fed. R. Crim. P. 35 Advisory Committee Note (1991 Amendment) (emphasis supplied). The Advisory Committee considered and rejected a proposed amendment that would have permitted modification based on new evidence within 120 days of sentencing, because that amendment would have injected an element of uncertainty into the determinate sentencing scheme. *Ibid.* "Thus, the addition of subsection (c) to Rule 35 demonstrates that district courts are to have only limited authority to correct sentences upon the defendant's motion, and Rule 35(c) fully defines the scope of that authority." *United States* v. *Fraley*, 988 F.2d 4, 7 (4th Cir. 1993). Because the district court's basis for modifying petitioner's May 17, 1996, sentence does not meet the limited criteria of Rule 35(c), the court of appeals correctly held that petitioner's sentence could not be altered simply based on "a change of heart by the sentencing judge." Pet. App. 7.[5]

Contrary to petitioner's contention (Pet. 7-12), the court of appeals also correctly held that the seven-day time period under Rule 35(c) begins when the district court orally imposes a sentence. The express terms of Rule 35(c) are not limited to entry of a written order but apply to a court's "imposition of sentence." On May 17, 1996, the sentencing court unequivocally

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[5] Petitioner does not contend that the district court had authority to amend her sentence under any other provision of law. See Fed. R. Crim. P. 35(a) (correction of sentence on remand); Fed. R. Crim. P. 35(b) (reduction of sentence based on government's motion for substantial assistance); Fed. R. Crim. P. 36 (correction of clerical errors); 18 U.S.C. 3582(c)(1) and (2) (modification of sentence upon motion of Director of Bureau of Prisons or when Sentencing Commission has lowered sentencing range).

imposed a sentence of confinement and supervised release. Pet. App. 45.[6] That the "imposition of sentence" occurs at the oral pronouncement of sentence, rather than at the time of the entry of the written judgment, is confirmed by Federal Rule of Criminal Procedure 32, which describes the steps for "imposition of sentence" in subsection (c)(3) separately from the entry of the written "judgment" in subsection (d).

Moreover, tying the imposition of a sentence under Rule 35(c) to the entry of a written judgment of conviction would be inconsistent with the defendant's constitutional right to be present at sentencing. As the court of appeals explained:

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[6] Contrary to petitioner's suggestion (Pet. 4, 8), the court did not conditionally sentence petitioner on May 17, 1996. The sentencing transcript makes clear that the judge merely agreed to permit petitioner's counsel to notify the court by the following Monday of the particular prison that petitioner preferred. Pet. App. 46-47. The designation of the place of imprisonment, however, is solely entrusted to the Bureau of Prisons, 18 U.S.C. 3621(b), which takes into consideration a variety of factors, including any recommendations of the sentencing court. 18 U.S.C. 3621(b)(4)(B). Petitioner also errs in relying (Pet. 9-11) on 18 U.S.C. 3582(b), which makes the judgment of conviction a "final judgment" notwithstanding that a sentence may be modified under specified conditions, and the Advisory Committee Notes to Federal Rule of Appellate Procedure 4(b) (1993 Amendment), which state that "in a criminal case, a posttrial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment." Neither Section 3582(b) nor the notes to Federal Rule of Appellate Procedure 4(b) purport to address the "imposition of sentence" under Federal Rule of Criminal Procedure 35(c).

> It is well established that a sentence orally imposed governs a conflicting, later-written sentence of the court. This rule is grounded in the Sixth Amendment which requires that a defendant be physically present at sentencing. When a judgment of conviction containing the sentence is officially entered of record, only members of the clerk's office are present. This cannot be what Congress meant in Rule 35(c) by 'imposition of sentence' in light of the Sixth Amendment.

Pet. App. 6 (quoting *United States* v. *Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994)). Recognizing that a sentence is imposed on the date of oral pronouncement also advances the purpose of Rule 35(c) to promote the finality of a sentence. See *United States* v. *Abreau-Cabrera*, 64 F.3d 67, 74 (2d Cir. 1995) (interpreting Rule 35(c) to require that sentence is imposed on date of oral pronouncement "best effectuates the intent of the rule's drafters—finality in sentencing"). The rule advanced by petitioner would have the opposite effect and would permit a sentencing court, like the district court here, "simply to change its mind about the appropriateness of the sentence." Fed. R. Crim. P. 35 Advisory Committee Note (1991 Amendment).

2. Contrary to petitioner's contention (Pet. 14-19, 22-23), there is no square conflict in the courts of appeals on the question whether a sentence is imposed under Rule 35(c) when it is orally pronounced, or when it is reduced to a written judgment of conviction. In *United States* v. *Clay*, 37 F.3d 338, 340 (7th Cir. 1994), the Seventh Circuit did state that "[t]he date of 'imposition of the sentence' from which the seven days [in Federal Rule of Criminal Procedure

35(c)] runs signifies the date judgment enters rather than the date sen-tence is orally pronounced." But that statement was not necessary to the judgment. The issue in *Clay* was whether the defendant had filed a timely notice of appeal when he did so after the judge had originally imposed sentence, but before the judge entered an order declining to reconsider the sentence.[7] The court held that the defendant's first notice of appeal, filed after the original imposition of sentence, was sufficient. It explained that, even treating the district court's consideration of modifying the defendant's sentence as the court's own motion under Rule 35(c), the "filing of a motion under Fed. R. Crim. P. 35(c) [does not] affect the validity of a notice of appeal filed before entry of the order disposing of the motion." *Clay*, 37 F.3d at 340 (quoting Fed. R. App. P. 4(b)).[8] *Clay* therefore turns on the principle that a notice of appeal filed before the

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[7] The chronology of events was as follows: the judge sentenced Clay on October 28; Clay filed a notice of appeal on November 2; the judge entered an order staying the October 28 sentence in order to reconsider the question of acceptance of responsibility in light of a new decision of the court of appeals on November 3; the judgment of conviction was entered on the docket on November 5; the judge determined not to modify the sentence on November 9; and Clay filed a second notice of appeal on November 12. See *Clay*, 37 F.3d at 340. It is not clear from the court of appeals' opinion whether the October 28 sentence was oral or written.

[8] In relevant part, Federal Rule of Appellate Procedure 4(b) states: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. 35(c), nor does the filing of a motion under Fed. R. Crim. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion."

disposition of a motion under Rule 35(c) is timely and that a second notice of appeal is not necessary after disposition of such a motion. See 37 F.3d at 340-341 ("Clay's first notice of appeal adequately secured review of his conviction and sentence by this court; his second notice of appeal was superfluous."). The court of appeals was not required to decide the issue presented here, *i.e.*, whether a modification of a sentence after its oral imposition was permissible under Rule 35(c).[9]

Petitioner errs in asserting (Pet. 15) that the First, Eleventh, and District of Columbia circuits have addressed the question presented in this case. In *United States* v. *Fahm*, 13 F.3d 447, 452-453 (1st Cir. 1994), it appears that the sentence was pronounced and the judgment entered on the same day, so that the court had no occasion to consider the issue of when sentence is imposed under Rule 35(c). Although the First Circuit in *Fahm* noted that it had suggested in *United States* v. *Morillo*, 8 F.3d 864, 866 (1993), that "imposition of sentence" under Rule 35(c) occurred when judgment was entered, the court in *Fahm* also noted that the suggestion was dictum. 13 F.3d at 453. Moreover, the decisions in *In re United States*, 898 F.2d 1485 (11th Cir. 1990), and *United States* v. *Jordan*, 810 F.2d 262, 266 (D.C. Cir.), cert. denied, 481 U.S. 1032 (1987), were rendered before the

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[9] Nor did the Seventh Circuit's decision in *United States* v. *Turner*, 998 F.2d 534, cert. denied, 510 U.S. 1026 (1993), on which the court in *Clay* relied, address whether a court may modify a sentence under Rule 35(c) more than seven days following oral pronouncement of a sentence. *Turner* also involved the question of the time-liness of an appeal and had no occasion to address the question presented in this case. 998 F.2d at 536.

1991 amendment to the Federal Rules of Criminal Procedure that resulted in the present Rule 35(c).[10]

Petitioner also errs in arguing (Pet. 13-14) that the decision of the court of appeals conflicts with *Lemke* v. *United States*, 346 U.S. 325 (1953), *Hill* v. *Wampler*, 298 U.S. 460 (1936), *Corey* v. *United States*, 375 U.S. 169 (1963), or *Korematsu* v. *United States*, 319 U.S. 432, 435 (1943). Those decisions were rendered well before the Sentencing Reform Act of 1984 and the 1991 Amendment to Rule 35.

3. Finally, petitioner makes a series of policy arguments (Pet. 23-29) that are more appropriately addressed to Congress or the Sentencing Commission than to the Court. In particular, petitioner's suggestion (*id.* at 27-28) that the decision of the court of appeals conflicts with the Sentencing Guidelines, or judicial interpretations of the Guidelines, is within the Sentencing Commission's competence to resolve. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991).

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[10] Petitioner also asserts (Pet. 18 n.3, 19-22) that multiple intra-circuit conflicts have arisen on when a sentence is imposed under Rule 35(c). Intra-circuit disagreements, however, do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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